Supreme Court, U.S.
FILED
MAY 5 1995
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No. 94-1446

In The

Supreme Court of the United States

October Term, 1994

McMILLION DOZER SERVICE, INC.,

Petitioner,

v.

STATE OF LOUISIANA,
DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Louisiana

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

This very brief reply is submitted in response to the opposition brief filed by respondent State of Louisiana, Department of Transportation and Development ("DOTD") in this matter.

Respondent offers essentially four reasons why this Court should decline to exercise certiorari in this matter:

(1) Plaintiff received in compensation for delay damages in the courts below than it complains of not receiving in interest, and therefore, has been over-compensated as it is;

(2) There is no prohibition to a state setting a date after a landowner's property is taken from which interest on any excess award should begin running since there are no cases that specifically address such a delay;

(3) This case is not worthy of this Court's attention since the statute at issue has been repealed, even though it does affect all landowners in Louisiana whose property was taken from 1988 through 1992; and

(4) Plaintiff failed to raise the issue before this Court in the proper manner in the courts below.

The first three of these arguments hardly require response. First, if respondent thought that the award of delay damages to plaintiff in the Louisiana courts was unconstitutional, it surely would have filed for review by cross-petition in this Court. Otherwise, it is certainly inappropriate to try to "offset" a constitutional violation with an argument that plaintiff received more money

than it would have had the case been heard under federal takings law. Second, respondent apparently fails to appreciate the cases cited in plaintiff's original brief decided by this Court that interest from the date of taking is a component of just compensation under the Fifth Amendment. The fact that there are no cases reflecting the effort by a state to limit the onset of interest to some point after the taking but before judgment is meaningless, except as it may reflect on the peculiarities of the State of Louisiana. Third, the importance of this matter lies in the fact that it involves a statute which governs the just compensation to be paid to every landowner in Louisiana whose property was taken over a fifty (50) month period from 1988 through 1992. If not addressed now, this issue will be back before this Court in another petition for writ of certiorari, of that we can be sure.

With respect to the fourth and final argument of respondent, namely the alleged procedural and jurisdictional deficiencies, petitioner is compelled to respond more fully since respondent has apparently overlooked both the undisputed facts in the record of this case and the undisputed law of the State of Louisiana.

Respondent states that petitioner failed to raise properly in the lower courts the constitutional issue put before this Court because (a) the Attorney General for the State of Louisiana was never made a party to the case; and (b) the constitutional issue was first raised at the appellate level. For the first proposition, respondent cites a 1984 Louisiana Supreme Court case, *Lemire v. NOPSI*, 458 So.2d 1308 (La. 1984). Opp. Brief, p. 12. Respondent fails to advise this Court that *Lemire* was partially overruled in *Chamberlain v. State*, 624 So.2d 874 (La. 1993), where the

Louisiana Supreme Court stated that the same language that respondent has quoted to this Court from *Lemire* "was, at the least, an overstatement of the requirements set forth in LSA-C.C.P. Art. 1880." Thus, in *Chamberlain*, the Louisiana Supreme Court held that Article 1880 merely requires that the Attorney General be notified of any constitutional challenge, and expressly ruled that notice by certified mail to the Attorney General satisfies the requirements of Louisiana law. Here, the notice requirement set forth in *Chamberlain* was met, as petitioner sent a certified letter to the Attorney General and filed a copy in the record below. App. 1-5.

Respondent also misleads this Court in suggesting that the constitutional issue here was improperly first raised at the appellate level. Once again, respondent fails to advise this Court of a recent ruling of the Louisiana Supreme Court directly on point, even though that ruling was brought to the attention of respondent in the proceedings below by a letter served and filed in the record. App. 6-8. Specifically, the Louisiana Supreme Court ruled that where one party raises a particular statute for the first time on appeal, the other party has the right to raise for the first time on appeal the argument that the statute is unconstitutional. *Rick v. State of Louisiana, Department of Transportation and Development*, 630 So.2d 1271 (La. 1994). In *Rick*, the same DOTD that is the respondent in this case raised at the appellate level, for the first time, a statutory limitation on pre-judgment interest, and the Louisiana Supreme Court held that it was thus proper for plaintiff to raise for the first time on appeal its argument that the statute was unconstitutional. Similarly, in this matter, the DOTD did not raise the applicability of the 1988 interest statute at the trial court level, even though petitioner

cited the 1992 statute and the *Kirby* case to the trial court. *See* Original Brief, App. 25-27. Rather, respondent only raised the 1988 statute for the first time in its appeal, and therefore, there can be no bar to the petitioner's constitutional challenge.

In any case, it is obvious that neither procedural issue raised by respondent here concerned the Louisiana appellate court, since it overturned the award of interest without even mentioning the procedural issues raised by the DOTD.

In short, respondent's arguments regarding the alleged procedural and jurisdictional bars to the consideration of this matter by this Court are specious. Regarding the substance of petitioner's writ application, respondent's arguments are simply weak. Indeed, respondent does not even attempt to argue that unreasonably depriving a property owner of post-taking interest can be constitutional.

The Petition for Writ of Certiorari should be granted, and this Court should exercise its discretion to reverse and remand by summary process, so that the constitutional guarantee of just compensation for the taking of private property is not violated in the State of Louisiana.

Respectfully submitted,

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[Letterhead Names Omitted In Printing]

December 9, 1993

55,595

BY HAND

Honorable Peter J. Fitzgerald
Clerk of Court
Fifth Circuit Court of Appeal
State of Louisiana
Fourth Floor
Courthouse Annex Building
Gretna, Louisiana 70053

(Filed
Dec. 9, 1993)

Re: State of Louisiana, Department of Transportation & Development v. McMillion Dozer Services, Inc., 5th Circuit No. 93-CA-00590

Dear Mr. Fitzgerald:

Pursuant to the requirements of La. R.S. 13:4448, we are enclosing herewith for filing, together with this letter, our certified letter and signed return receipt of September 30, 1993, to the Attorney General, notifying him of a potential constitutional issue in the captioned appeal. No reply has been received.

Please file stamp the enclosed duplicate of this letter and attachments and return to the Court Runner delivering this to you.

We appreciate your courtesies and attention to this matter,

Respectfully,

/s/ Randall Smith
Randall A. Smith
Of
STONE, PIGMAN, WALTHER,
WITTMANN & HUTCHINSON

Counsel for
McMillion Dozer Service, Inc.

RAS/nbc
Enclosures
cc: Bernard L. Malone, Jr., Esq.
Ronald J. Bertrand, Esq.

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[Letterhead Names Omitted In Printing]

September 28, 1993

55,595

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Honorable Richard P. Ieyoub
Attorney General, State of Louisiana
22nd Floor, State Capitol
Post Office Box 94005
Baton Rouge, Louisiana 70804

Re: State of Louisiana, Department of Transportation and Development v. McMillion Dozer Service, Inc., Fifth Circuit No. 93-CA-590

Dear Attorney General Ieyoub:

Please consider this to be notice to your office of the pendency of the captioned matter, which may involve the interpretation by the Court of Appeal of whether it would be unconstitutional to apply La. R.S. 48:455 (1988) (repealed) to a judgment rendered after it was repealed. Although we do not think this is a matter that requires notice to your office pursuant to Code of Civil Procedure Article 1880 or otherwise, since our client is a defendant

who is not asking for any type of declaratory relief, and since the only conceivable constitutional issue involved relates to a repealed statute; out of an abundance of caution we are notifying you of the pendency of this suit in case you may wish to take any action therein.

We enclose courtesy copies of the original briefs filed in this matter. No reply brief has been filed yet by the State, and we would have no objection to an extension of time in which to file one, should your office wish to appear in the case. Oral argument is not until December 7, 1993. Bernard L. Malone, Jr. of the Office of General Counsel of the Louisiana Department of Transportation and Development has been handling the matter on appeal for the State. If you have any questions or need any further information, please do not hesitate to let me know.

Very truly yours,

/s/ Randall A. Smith
Randall A. Smith
Of
STONE PIGMAN, WALTHER,
WITTMANN & HUTCHINSON

Counsel for McMillion Dozer
Service, Inc.

RAS/sp
Enclosures

P 918 972 266

SENT TO:

Honorable Richard P. Ieyoub
Attorney General, State of La.
22nd Floor, State Capitol
Post Office Box 94005
Baton Rouge, Louisiana 70804

RECEIPT FOR CERTIFIED MAIL

3. Article Addressed to:

Honorable Richard P. Ieyoub
Attorney General, State of La.
22nd Floor, State Capitol
Post Office Box 94005
Baton Rouge, Louisiana 70804

4. Article Number

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[Letterhead Names Omitted In Printing]

February 10, 1994

55,595

BY HAND

Honorable Peter J. Fitzgerald
Clerk of Court
Fifth Circuit Court of Appeal
State of Louisiana
Fourth Floor
Courthouse Annex Building
Gretna, Louisiana 70053

(Filed
Feb. 10, 1994)

Re: State of Louisiana, Department of Transportation & Development v. McMillion Dozer Services, Inc., 5th Circuit No. 93-CA-00590

Dear Mr. Fitzgerald:

I am writing this letter in connection with the captioned matter which was argued before a panel of this Court on December 7, 1993. We would ask that you be sure that the enclosed extra copies go to the Judges who were on the panel of this case.

The purpose of this letter is to advise the Court, and specifically the Judges on the panel, of a recent Louisiana

Supreme Court case which was decided after argument on this matter and is directly relevant to one of the issues on appeal. That case is *Rick v. State of Louisiana, Department of Transportation and Development,* 1993 WL 558359 (La. 1994).

One of the issues in the *Rick* case was the constitutionality of a statutory limitation on the amount of prejudgment interest a plaintiff is entitled to against the State of Louisiana. Since that statute was not relied upon by the DOTD at trial, but rather was raised for the first time on appeal, the Louisiana Supreme Court held in *Rick* that "plaintiffs' argument that it is constitutionally invalid should have been considered." *Id.* at p. 5.

Similarly, in the captioned matter pending before this Court, the DOTD did not raise the repealed 1988 interest statute in the lower court but only raised it for the first time on its appeal of the lower court's award of interest from the date of taking. Therefore, as held by the Supreme Court in *Rick,* McMillion's argument that the statute relied upon by the DOTD is constitutionally invalid should be considered by this Court on appeal, despite the protestations of the DOTD to the contrary.

In short, *Rick* stands for the proposition that it is not fair to bar a party from questioning the constitutionality of a statute that the opposing party raises for the first time on appeal. Therefore, this Court should consider the merits of McMillion's arguments regarding the constitutionality of the 1988 repealed statute without considering the procedural bars the DOTD has attempted to raise.

We would be happy to brief this issue if the court should so desire in light of this new case.

We appreciate your courtesy and attention to this matter.

/s/ Randall A. Smith
Randall A. Smith
Of
STONE PIGMAN, WALTHER,
WITTMANN & HUTCHINSON

Counsel for
McMillion Dozer Service, Inc.

RAS/nbc
cc: Bernard L. Malone, Jr., Esq.
Ronald J. Bertrand, Esq.